



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE
AMERICAN LAW REGISTER.

~~~~~  
NOVEMBER, 1853.  
~~~~~

ON MUNICIPAL SUBSCRIPTIONS TO THE STOCK OF
RAILROAD COMPANIES.

Remarks on the opinion of Black, C. J., in the case of

SHARPLESS, ET AL., vs. THE MAYOR, &C., OF PHILADELPHIA.*

It seldom happens that an opinion of a Court of law excites an interest so strong and general as that produced in this community by the decision in the above case. This interest, however, is hardly commensurate with the importance of the case; for the question involved is nothing less than whether the Legislature can confer on municipal authorities unlimited power over the property of every citizen.

The extensive consequences of this decision justify, and are required to justify, the expression of an opinion differing from that of the learned and respected Chief Justice. The declaration of clear and honest convictions, however, is rendered more urgent by

* The Editors of this Journal desire it to be understood, that in admitting this able article to their pages, they do not intend thereby to assent to all its propositions.—*Eds. Am. Law Reg.*

the eminence of the Judge as a jurist, and the merited confidence he enjoys; for these qualities, while they add to the influence of sound doctrine, give also their sanction to error, if error be committed.

The case arose under recent Acts of Assembly, authorizing certain municipal corporations to subscribe for the stock of two railroads situated out of the limits of the respective corporations, and to raise money for the purpose by a loan.

It is conceded by the Judge, and implied by the enactment of these laws, that no such power was possessed before they were passed, and that they were necessary to give the power. Municipal corporations already had all the powers required for the purposes of their existence, for their duties and responsibilities. They possessed them independent of their charters, and by common law, as incidents of municipal corporations. The proper functions of such corporations are confined to the government of the place, to preserve order and to promote the health, comfort, convenience and welfare of its people by police regulations, by opening roads and streets, and by the erection of buildings, and such other accommodations as may be required. For these purposes they may impose taxes and make ordinances, but beyond these local purposes their power does not extend. They cannot enter into schemes for the general welfare of the place requiring action beyond its limits. They cannot attempt to promote the wealth or commerce of a city or district, or its interests of any kind, by other means than local government for local objects.

These principles are developed and expounded, and the authorities supporting them collected by Mr. Binney, with the clearness and force by which he is always distinguished, in his "Opinion upon the right of the City Councils to subscribe for stock of the Pennsylvania Railroad Company," published in July, 1846. Speaking of the City, he says: "When we come to the consideration of matters which are not part of her local duties, and are not within her local superintendence, but operate *indirectly* upon her welfare as everything done by the State anywhere in the State does, more or less—roads, bridges, canals, public works of any kind—these, as

they are matters of public concern, and *operate upon others as well as upon the City*, and no part of them is within her limits, are altogether within the duty of other persons, and no power can be implied in the Corporation to effect them or any part of them. The State may tax our property to make such works; the City cannot. * * * The power to carry on such public works by the resources of her inhabitants, or the power to make them because they might afterwards, by a local work, be made available within the City, cannot be maintained without throwing *the State out of her orbit and putting the City in her place.*"

This opinion of Mr. Binney is confirmed by Judge Black, who says: "No lawyer doubts that a borough can only subscribe to a railroad when expressly authorized by law to do so."

Such being the law, certain parties, under the plea of the public good, a plea always used when private interest seeks its gratification at the public expense, have obtained from the Legislature the enactment of various laws, giving to this City and other municipal corporations authority to subscribe to the stock of many different railroads, and to borrow the money to pay for it.

These laws confer power not possessed before, and for objects not necessary to the government of the City or districts. They authorize the expenditure of money for works beyond their limits, intended to promote their interest indirectly, and in common with large portions of the State. Above all, for these purposes, distant in their sphere, extensive in their influence, foreign to the purposes of municipal government, and heretofore unknown to the law, they grant to petty local authorities the power of taxation to an almost unlimited extent.

Now, the question is—can the Legislature constitutionally grant such powers? If it can we are indeed launched upon a sea of danger and trouble, and hold our property by an insecure tenure; for, as Judge Black says, "If the power exists it will continue to be exerted, and generally it will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large."

Government is created for the protection of life, liberty and property. These are dear to man, and through ages of contest he has struggled to surround himself with safeguards to shield them, and the best he has yet discovered is a representative government of restricted powers. Such is the government of Pennsylvania. But though its powers are limited, they are very great. It has the power to take life, to restrain liberty, to appropriate property, if done in accordance with that written plan of government conferring these powers, called the Constitution.

We have reached a point in our political progress at which life and liberty are well protected from violence and cruelty on the part of government. But from attacks on property we have not the same security, because of the universal rapacity which it stimulates, and because the various shapes these attacks assume make it very difficult to guard against them. A violent taking of the property of an individual by the government, an arbitrary appropriation of it without compensation, would be a clear violation of the Constitution, would excite general alarm, and the Courts would render it ineffectual. Measures so coarse and open to notice are not likely to be attempted. The great danger lies in the power of taxation. Its approach is stealthy, covert, often unobserved. It makes no violent assault. It is always masked by alleged good intentions—by the ever ready pretext of the public good. It is capable of being prompted and guided and perverted in a thousand ways by fraud, corruption and private ends. It may be made to serve the interests of a class, a clique or a party, and it can assume so many disguises, that the unsuspecting people may find the very citadel of their safety destroyed before they know their danger. For this reason the power of taxation is the most formidable engine of tyranny, and should always be watched with jealous care. The history of the resistance of the people to its unjust exercise would be a history of the progress of liberty. Our own national history commenced with such resistance, which resulted in the establishment of the free institutions under which we live and prosper. But we should beware of a false and fatal confidence in our

forms of government. This insidious power is dangerous under all forms, and quite as likely to do mischief in a democracy as in a monarchy.

The power to appropriate private property for public uses, without compensation except from such uses, in other words, the power to tax is an attribute of sovereignty—a high prerogative of government. This power, by the common law and by grant, municipal corporations possess and have always possessed as a necessary incident, to be exercised for local purposes and limited to local purposes. Such local powers formed an essential part of our system before the constitution, and are recognized in it. The Legislature has granted to these corporations an enlarged power of taxation for general purposes, not necessary or conducive to the exercise of their functions of local government.

In other words, the government of the State has delegated to these inferior local governments its power of taxation.

This is very clear. Municipal corporations previous to these acts of Assembly possessed all the powers necessary for their corporate purposes, for the regulation of their internal affairs, for the government of their respective places of jurisdiction. They possessed them of necessity as an attribute of corporate existence—without which they could not fulfill the purpose of their creation, for this purpose is local government, it being impossible for the Legislature to manage the affairs of every town and county in the State. They possessed them by common law growing out of and supplying that necessity, and they possessed them by charters and laws giving them corporate existence, which are declaratory of the common law. Without such powers they would not be municipal corporations.

But these were all the powers they did possess. They had no authority to promote their own welfare by means unconnected with government, beyond their limits and indirectly beneficial. To come to the case in point, they had no power to impose taxes for the construction of works distant from their places of jurisdiction, and calculated to increase the trade and wealth of these, in common with other parts of the State.

This was no part of their duty and therefore no part of their power, but it is both the duty and power of the Legislature. It belongs to the Legislature because it was confided to it by the people. The Legislature has delegated this power to another government to which it was not confided by the people. Whether the Legislature has the right thus to divest itself of power, duty and responsibility imposed on it by the constitution and to substitute others in such a trust, appears to be a question in this case worthy consideration.

The first section of the first article of the constitution declares that "the legislative power of this commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives."

There can be no such thing as a delegation of trust power. This is an universal maxim of law and morals. The reason is that confidence in the capacity and fidelity of the party to whom the power is given is the foundation and consideration of the trust. The constituent is entitled to the exercise of the ability and judgment of the trustee whom he selected, not of some one whom he did not select. To use the language of Judge Bell in *Parker vs. The Commonwealth*, 6 Barr. 515—"among the primal axioms of jurisprudence, political and municipal, is to be found the principle that an agent, unless expressly empowered, cannot transfer his delegated authority to another, more especially when it rests in confidence partaking of the nature of a trust, and requiring for its due discharge understanding, knowledge and rectitude. The maxim is 'delegata potestas, not potest delegari.' And what shall be said to be a higher trust, based upon a broader confidence than the possession of the legislative function. What task can be imposed on a man as a member of society requiring a deeper knowledge and a purer honesty? It is a duty therefore which cannot be transferred by the representative, no, not even to the people themselves, for they have forbidden it by the solemn expression of their will, that the legislative power *shall be* vested in the General Assembly."

But there is a stronger reason. If the constituent be entitled to the fair exercise of the ability and judgment of the representative, he is also entitled to all the guards and checks by which, for his

protection, the constitution has surrounded the power of that representative. These are—the numbers and qualifications required in the members of the General Assembly, for a body so large and so constituted and coming from all parts of the State, is less liable to improper influences than the Councils of a City or the Commissioners of a District; the assent of the Senate, because should the House of Representatives be guilty of rash and injurious legislation, the wisdom and stability of that body may prevent it; the approbation of the Executive, which, should both House and Senate be moved by mistaken or corrupt counsels, may chance to be withheld, and so mischief be prevented. In short he is entitled to the protection of the whole legislative body, the governor included, upon which the power and duty of making laws is imposed by the constitution, and which has no authority to create a subordinate government, an imperium in imperio, by transferring this power and duty to others.

But it may be said that the Legislature in this case did act—that it really did impose the taxes as it passed in due form the laws authorizing them. But to this argument the answer is obvious. These laws are not mandatory—they *authorize* the municipal officers to make the subscriptions. The important questions whether the public interest requires the subscriptions at all, whether the burden of taxation is not already sufficiently great, and what shall be the amount of the subscriptions, are left to the judgment of those officers. They are not made the agents of the Legislature, but *discretionary power* is given to them, power to lay taxes for purposes external to their sphere of action, and affecting it not primarily, but indirectly as a portion of the State. Such power the constitution has confided only to the Legislature, to be exercised by it alone. If the Legislature can delegate this, it can delegate any other of its powers, for it could still be said that the law bestowing the power was a law exercising it.

The delegation of the power of taxation to municipal corporations, has been likened to the power frequently granted to railroad companies, to take the property of individuals for the purposes of their roads, with compensation to the owner. This is done by the

right of eminent domain, inherent in every government, and from which also is derived the power of taxation. The power thus delegated is purely ministerial, not discretionary. The legislature itself decides on the propriety of making the road, whilst the course it is to take, with many other details, are specified in the charter. It decides and does all that it is possible for it to do, and then by its agent the railroad company, does that which a legislature cannot do in the nature of things—lay out the road and determine whose land shall be taken. These duties can only be performed by engineers and surveyors, they cannot be performed by the members of the legislature. There is no delegation of legislative power whatever. This is exercised and exhausted in the grant of the charter. The taking of the land, is by the government acting by its agent, the railroad company, and the government could do no more and no less, if it constructed the work itself, instead of giving the company the privilege of constructing it.

Neither are the powers of local government possessed by municipal corporations, delegated powers, but more properly an absolute grant of power which the Legislature cannot itself conveniently exercise. They are incidents, inherent qualities in all such corporations, and arise of necessity whenever they are created, because essential to the purposes of their existence. To take them away is to destroy the corporation, to form the corporation is to give them. They may be enlarged within certain limits, as in the case of the privilege granted to a city or county or township, to pay for the portion of a road running through it, but the moment they are extended beyond the sphere of local regulation, and made to embrace external objects and the interests of other places, then they become legislative power, which belongs only to the legislature, and belongs to it to exercise, and not to transfer.

Judge Black, in the able opinion referred to, says very justly, "Local taxes for local purposes, and general taxes only for general purposes, which concern the whole State, are a vital principle of our political system." The question is, what are local purposes? It is a work which is to benefit Philadelphia in common with the whole State local as to Philadelphia. Is the Pennsylvania Rail-

road, to which the city has also subscribed, which runs from one end of the State to the other, which is a benefit to Pittsburg, to every town and county through which it passes, local as to Philadelphia, which it is expected also to benefit? Does it not sufficiently "concern the whole State," to become the subject of "general taxes?" Are the public improvements, the railroads and canals made by the State, which are of great importance to Philadelphia, local because of that importance, and could the city have been exclusively taxed to pay for them? Is it, can it be sufficient, in the language of this opinion, that "a palpable and clear absence of all *possible* interest perceptible to every mind at the first blush," should be necessary to render such taxation as unconstitutional as it is manifestly unjust. If so, if this scintilla of interest be enough, there is no work of whatever magnitude, that can directly or indirectly, increase the trade of the city, which may not also be considered local, and for the construction of which, the people of Philadelphia may not be taxed. A railroad to the Pacific would materially advance the interests of this city in common with all other cities in the country. Would that be local? Lines of steamers to the different ports of Europe, would increase our commerce, nay, railroads to facilitate the transport of merchandise to those ports, would have the same effects, and would be embraced by this reasoning. If every thing is to be considered local, by which the wealth and prosperity of the city may be indirectly and in any degree promoted, municipal authorities in Pennsylvania have indeed a wide scope and a most dangerous power over the property of citizens.

Judge Black, after stating that the Commonwealth has itself subscribed to railroad companies, asks: "If the Legislature may create a debt and lay taxes on the whole community to pay such subscriptions, may they not with more justice and more propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves to promote in a similar manner, a public work in which they have a special interest." If the work be purely local, the corporation has the power already, or the Legislature may constitutionally grant it. If it be of general

interest to the whole State as well as of special interest to the place taxed, it comes within the sphere of the State government, which cannot delegate its powers for the reasons already given. Neither can a particular portion of the people, nor the whole people, tax themselves, except in the manner pointed out in the constitution, that is, by their representatives. For corporate purposes, their representatives are corporate authorities; for general purposes, the State government. No meeting of the people can lay a tax or authorize any one else to lay it, nor can the Legislature confer on such meeting, the power to do so. This would be a delegation of legislative power, and unconstitutional, as decided in *Parker vs. The Commonwealth*. A meeting of the people can only express an opinion, which may or may not influence the government. Government alone can act, and in its proper sphere; local government for local objects, State government for general objects, and it is only by keeping each to its place, that the rights of the people can be secured.

The learned Judge compares the power to subscribe to railroads, advantageous to a particular place, but also embracing in their influence, the whole State, to the power possessed by municipal corporations to erect public buildings, and to make roads and bridges. But the difference between the two cases is important, and well illustrates our argument. Corporate authorities have no power to erect public buildings, to make roads and bridges; they have only power to pay for them. The power to decide whether the public interest requires them, whether the people shall be taxed for them, is entrusted to the courts, to the judiciary department of the government established by the constitution. Thus placed, the power is subjected to various conditions and restraints, which are so many guarantees that it shall be fairly and wisely exercised. These guarantees are, the character of the tribunal, composed of judges supposed to be selected because of their fitness to discharge high and difficult duties, of Grand Juries and juries of view and review, temporary representatives of the people of the vicinage; the opportunity afforded to those interested to be heard by counsel; the publicity of the proceedings; the duty imposed on the Court to

give an opinion in the face of the public and of the bar, together with the reasons for that opinion.

The analogy fails also in another point. The Court cannot authorize the making a road, the erection of a bridge or public building out of the county, however advantageous such might be to the interests of the county. Its jurisdiction and power are local, and extend only to local objects to be attained by local means.

To bestow, therefore, on municipal corporations, power beyond these limits, power over things which concern directly or indirectly the whole State, is to bestow on them legislative power which the constitution declares shall be vested only in the government of the Commonwealth, and which it has no authority to delegate; it is "throwing the State out of her orbit, and putting the City in her place."

But granting the right of the Legislature to delegate its power of taxation, can it be contended that it has the right to delegate power which it does not itself possess.

Now can the Legislature itself, do what it has authorized the councils of this City and other municipal corporations to do? Can it tax one city or county of the State for purposes connected with, promoting and intended to promote the interests of the whole State? The Commonwealth of Pennsylvania has constructed lines of public improvements throughout the State. For this purpose, it has incurred a heavy debt; the burden of that debt is borne by the whole State. The City of Philadelphia is benefitted by those improvements. Her business, her commerce, her wealth, have been vastly increased by them. Would it have been competent to the Legislature, to impose separately upon her the expense, or any part of it, of constructing them? Would it not have been considered unjust, oppressive, monstrous? Yet this is precisely what the Legislature has authorized the Councils of this City, the Commissioners of the District, and other municipalities to do; for the works to which it has permitted them to subscribe, penetrate every part of the State, are calculated and intended to advance the interests of every part, and are more extensive and costly than the State works themselves.

Would it not also be unconstitutional? The constitution declares that the legislative power of the commonwealth shall be vested in a general assembly. This grant of the whole power of the commonwealth implies co-extensive objects. It implies that the good of the whole shall be promoted by the power of the whole. It does not imply that such good shall be promoted by the exercise of the power of the whole, upon a part. On this point we will quote the language of Judge Black: "The whole of a public burden cannot be thrown upon an individual under pretence of taxing him, nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the power of the Legislature, because they did not pass to the Assembly by the general grant of legislative power. A prohibition was not necessary. An Act of Assembly commanding or authorizing them to be done, would not be a law, but an attempt to pronounce a judicial sentence, order or decree."

If one portion of the state cannot be taxed to pay the debts of the whole, it follows of necessity that it cannot be taxed for the benefit of the whole.

The question again arises, what are general interests and purposes? The varied concerns of mankind are, by the wisdom of nature, so united that it is not easy to benefit a part without benefitting the whole. A road or a bridge in one county, increases the trade of adjoining counties and through them of the state. An improvement in the wharves of a sea port, by promoting its commerce, adds to the wealth of the interior. A rail-road in one part, is a benefit to all parts. What then is the criterion? What constitutes local interest? It is obvious that no interest can be strictly local in its influence, any more than any existence, individual or corporate, can be entirely separate and private. It is connected with other existences by many ties. The life of a man affects more or less his fellow men in his various relations, yet he has no difficulty in distinguishing the obligations of those relations. He can discriminate between his duties to himself and family and his duties as a citizen. The existence of every state in the union has its influence on every other state, and each owes duties to itself and to

all the others, yet the general government cannot lay a tax on Maine exclusively, for a purpose equally beneficial to Georgia. Philadelphia and Lancaster County, are reciprocally very advantageous one to the other, yet it would be grossly unjust to tax Lancaster County alone for the benefit of both. Local purposes therefore for which local taxes may be imposed, are those whose effect is direct not indirect, immediate not mediate, exclusive, so far as in the nature of things they can be exclusive, not general. They are, in short, precisely those purposes for which municipal corporations were, before these Acts of Assembly, clothed with ample power by the common law, by statutes and by the constitution, to be exercised by Grand Juries, by Courts, by City Councils and by Commissioners. To extend them to purposes embracing the whole state, with authority to tax their respective districts for such purposes, is to delegate power to tax a part for the benefit of the whole, a power which the Legislature itself does not possess.

The Legislature cannot itself exercise such a power not only for the reasons already given, not only because as Judge Black says, such an act would be a "judicial order, sentence or decree," that is, not legislation but confiscation, but because it would be a violation of Section 10 of the Declaration of Rights, which says: "nor shall any man's property be taken or applied to public use, without the consent of his representatives and without just compensation being made." This restriction has been generally referred to what is called the right of eminent domain, but the distinction between this right and that of taxation, relates only to the application of the power, not to its nature and essence. Both are rights of eminent domain, that is, both are founded on the supreme power of the government over private property for public use. When the property of the whole people is taken for general purposes, or of a portion of the people, for the local purposes of that portion, compensation to these is inferred from the public use to which the property is applied, and it is called taxation. But, when the property of an individual is taken for public use, such compensation is not implied, and therefore compensation must be made. Inequality of the burden makes the difference. To mark the distinction, such

taking is said to be by right of eminent domain, probably because it is a more striking and unusual exercise of the supreme power than taxation, and required more special restriction. The temptation to its abuse is greater, the defences of those subject to it weaker, for what individual, without constitutional protection, can withstand the power of government? Taxation on the other hand may be resisted. The whole community is interested to resist, and the ballot box gives it the power.

Now what is the difference between taking the property of an individual for public use, and taking the property of the people of a city or district for state use? Can the law infer compensation more in the one case than in the other; is not the inequality of the burden the same in both? Is the interest, however small, which the city or district has in the work, in common with the rest of the state, a compensation sufficient to satisfy the requisitions of the constitution? If so, every individual whose property is taken, has the same degree of interest as a member of the community, for every one is benefited more or less by every public improvement, and if such interest be sufficient, then this provision of the constitution may be entirely annulled, by exercising the right of eminent domain, under the name and disguise of taxation.

But it is said, an individual may give his property for the public use, why may not a city or district give its property for state use; why may it not be taxed for such use by its own consent?

The answer is, because there is no constitutional mode by which such consent may be expressed. The constitution says, that a man's property cannot be taken for public use, "without the consent of his representatives," that is his representatives for that purpose. Meetings of the people cannot express such consent, for they are not his representatives for any purpose. Corporate authorities cannot express it, except for corporate purposes. His city and county delegates in the legislature, cannot express it, for they have no such authority. They represent him only as a citizen of the State, the moment they are elected they represent the whole state, their power extends over the whole, they act with the other representatives of the whole, and have no power to bind

a part except in common with the whole. If they had this power, one of the chief bulwarks of the constitution would be taken away.

There may be cases in which the distinction between a local and a general purpose is difficult to define, but in the cases before the court, in the Water Gap Rail-road and the Hempfield Rail-road, as also in the Pennsylvania Rail-road and a number of others, the distinction is broad and marked, it is to be seen "at the first blush."

The wise provisions of the constitution for the protection of property, have been disregarded in another most important point, by this delegation of legislative power.

Article I. Sect. 21st of the Constitution, says: "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other bills."

The object of this restriction is to secure the people from unjust and oppressive taxation, by confining the authority to impose it to their immediate representatives, to the more popular branch of the Legislature. It was intended to carry out the great principle of all free governments, the principle on which our own is emphatically founded, that there can be no just taxation without representation. Only on this condition can it be maintained with truth that taxation is no tyranny. To wrest this power from kings and privileged classes, and to place it in the hands of the people, has been the chief object of those successive contests, out of which has slowly and painfully arisen, that sheltering, time-honored and time-cemented fabric of English liberty, whose principles, confirmed by the experience of ages, elaborated by the genius of the wise and vindicated by the blood of the brave, it has been our happiness to inherit. Among them it would be difficult to mention one of more importance, than that which is expressed in the language of the constitution just quoted, "all bills for raising revenue, shall originate in the House of Representatives."

As early as the reign of Richard II. the power of originating bills for revenue was placed in the House of Commons, by whom a tax was granted with the assent of the Lords, although the necessity for

their assent was afterwards disputed. The maxim that there can be no just taxation without representation was asserted in Magna Charta, afterwards more fully and comprehensively in the statute called *confirmatio chartarum*, in the twenty-fifth year of Edward II., which abolishes "all aids, tasks and prices, unless by *common consent of the realm* and for the *common profit thereof*," and having been at all times the subject of contention between the crown and the people, it was finally, in that revolution which cost Charles I. his life and established the liberties of England, again declared in the Petition of Right, which has ever since been regarded as part of the organic law, "that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like, without *common consent by act of Parliament*."

Now what is revenue? Is it not money raised from the resources of the whole State, by the power of the whole, for the good of the whole? It cannot be raised from the whole for the benefit of a part. It cannot be raised from a part for the benefit of the whole. When it is raised for the benefit of the whole, it must be by the power of the whole. The power thus granted and thus limited by the constitution, reaches the full extent of its sphere, and as it cannot be contracted to embrace a part, so local, subordinate power cannot be enlarged to embrace the whole.

The public improvements, the railroads and canals of Pennsylvania, built by the State, were intended to promote and have promoted the welfare of the State. Some parts have been more directly benefitted by them than others, but all have received benefit direct or indirect. Mathematical equality of benefit from such works is impossible, and what is impossible cannot be required. It is sufficient that they form a great system of improvement which has vastly increased the business capacity, the facilities for trade, and thus the wealth of the whole State. These works cost about forty millions of dollars. The money was raised by loans on the credit of the *whole* State, the interest of which is now paid, and the principal must hereafter be paid, by taxes laid on the whole State. These taxes are rightfully imposed, because they are imposed by the power of the whole, for the good of the whole. They are

revenue. They were imposed by bills originating in the House of Representatives, subject to the amendments and dissent of the Senate, and to the veto of the Governor, subject to all the checks and guards provided in the constitution.

The various rail-roads to which the Legislature has authorized subscriptions by municipal corporations, may be described in the same language, save as to the means by which they are to be paid for. They reach almost every portion of the State, they are more costly than the State works, and more extensive in their influence in increasing the business, the commerce and the wealth of the whole State. They have been and are to be constructed in great part by private capital, but to a very considerable extent, to the extent of upwards of thirteen millions, by *taxation*.

Now is not the money so raised revenue? Is it not as strictly and positively revenue as the money raised by taxation to build the State works? If money raised by taxation to build the State works be revenue, why is not money raised by taxation to construct works more extensive in their influence on the prosperity of the *whole* State also revenue? Judge Black says—"taxation is a mode of raising revenue for *public* purposes,"—and if this money be revenue, is it not a grave and dangerous violation both of the letter and spirit of the constitution, to delegate to City Councils and to Commissioners of Districts, who represent the people for no such purpose, who have not even the power to determine on the building of a bridge or a court house, or the opening of a road, the power to raise it by taxation. Are not the people, are not especially those who are opposed to these taxes, whether a majority or a minority, before their property is taken, entitled to have the question, whether it shall be taken, passed upon by their representatives, by the House, the Senate and the Governor? Are they not entitled to all the checks, balances, defences and guarantees provided in the constitution?

As yet, the power thus to raise revenue for the advantage of the whole State, by taxes laid on a part of it, has been delegated only to specified corporations for specified works. But if the Legislature can grant a special, it can also grant a general authority to all

municipal corporations, to subscribe to any extent, for any work which in their judgment may add, directly or indirectly, in any degree to the prosperity of their respective localities. The reasoning which sustains the grant of special, will equally sustain the grant of general power. If these powers exist, they will, as Judge Black says, be exerted. Many things passing around us, assure us that they will. When corporations wielding great capitals, seek to obtain legislation, they are not easily denied. They are armed with formidable influences, good and bad. The times are not without warning that the power possessed by government to borrow money and to impose taxes, though exercised only by the government, guarded as it is by the constitution, is dangerous enough, that it is not sufficiently guarded. The influences to which it may be subjected, the purposes to which it may be perverted, the corruption of which it is the prolific source, are revealing themselves to all observers. To delegate this immense power over the property of every citizen, to the petty authorities of cities and counties and districts, to obscure men elected by small portions of the people for small objects; to give to such men, power to borrow millions, to impose taxes for millions, for the construction of works beginning and ending hundreds of miles from the limits of their minute territories, and embracing in their scope, the material interests of the whole State; to subject such men to the seducing influences of capital, of superior intelligence and social position, seeking their own ends, of transient, ignorant, local popular opinion artfully manufactured, inflamed and exaggerated by demagogues; what is it but to sweep away every restraint established by the constitution, every defence that stands between cupidity and property, and to convert the government into an oligarchy, leaving only the mocking forms, the empty shell of a republic?

This power so rashly granted, has already been exerted to such an extent that important interests have grown up under it. Valuable improvements have been commenced, millions have been borrowed, and the bonds which represent them have passed into the hands of innocent holders. A vast amount of property was

therefore at stake upon the decision of this case. That is to say, the practical question involved in the case was, who are the rightful owners of this property? Ought the money to remain in the pockets of the people taxed, or is it to be paid by them to the holders of the bonds?

Had the decision of the Court been different, much financial confusion and alarm, much distress and loss to individuals would have been produced, and this is the natural consequence of unjust legislation and usurped power. The defrauded holders of the bonds would have had great reason to complain. They would have had a meritorious claim to indemnity, but upon whom? Obviously upon the Legislature, whose error, or something worse, had produced the evil, and through it, upon the people of the State, whose interests these works will so extensively promote. The Legislature is competent to tax the whole people for them or any part of them, because the whole State is benefitted by them.

But such consequences, however disastrous and deplorable, sink into insignificance, when compared with the importance of maintaining inviolate, the great principles which are the foundations on which rest the liberty and security of society. The destruction of any amount of property, is of small concern, when compared with the destruction of those constitutional defences by which all property is protected. Financial derangement and pecuniary loss, are soon repaired by enterprise and industry under free institutions, but it is a hard and painful and perilous task to re-construct a government, to restore the walls of safety which have been undermined by corruption or shattered by popular violence and folly. The losses or gains of individuals, however serious, which hang upon the decision of principles of law, above all, of great principles of constitutional law, are interests of the few and of the passing hour, but the principles themselves command the destinies of the whole people, and of all the future.

We do not regard this case as a *casus omissus*, an exposed and vulnerable part of the body politic not protected by the constitution. It is fully covered by the panoply of the organic law, and it is not necessary to invoke in its defence, "the general principles of

justice, liberty and right," not contained in that law, and which, therefore, Judge Black says "are no proper elements of a judicial opinion upon it." Fortunately, neither the wisdom of those who framed that law, nor of those from whom it was chiefly derived, was so short-sighted. The necessary provisions are to be found in it, not implied only, but expressed, not in its spirit alone, but in its letter. Guided by these, we think it clear that the acts in question are unconstitutional, because they are a delegation of legislative power; because they authorize taxation of a part of the State for the benefit of the whole; because the money so to be raised is revenue, which can only be raised by the General Assembly, and by bills originating in the House of Representatives.

CECIL.

Philadelphia, Oct. 1853.

RECENT AMERICAN DECISIONS.

In the District Court of the United States, for the District of Wisconsin. August, Special Term, 1853.

EDWARD A. WRIGHT, ET AL. vs. CHARLES N. SHUMWAY, ET ALS.

IN EQUITY.

1. A mortgage given to secure a debt then due and payable may be redeemed or foreclosed at any time.
2. A covenant on the part of a settler upon unsurveyed lands of the United States to purchase those lands as soon as they are surveyed and offered for sale by the Government, and then mortgage them to a creditor for the security of a debt, is not a contract in violation of Sections 4 and 5 of an Act of Congress, entitled "An Act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the land of the United States. [4 U. S. Statutes at Large, 390.]
3. An equitable mortgage springs from an agreement that there shall be a lien. A covenant, by a debtor with his creditor, to purchase certain lands therein described, and to mortgage them to said creditor as a security for a debt, is an equitable mortgage, and will be enforced in equity by a decree of sale of the premises, in pursuance of a prayer of a bill for that purpose.